No. 96-1463

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

METRO-NORTH COMMUTER RAILROAD COMPANY,

Petitioner,

—v.—

STEPHEN M. PADILLA and the EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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14 pp

TABLE OF CONTENTS

PAGE

ARGUMENT 1

I. THE LIABILITY HOLDING IN THIS CASE WILL AFFECT THE RESOLUTION OF MANY OTHER DISCRIMINATION CASES 1

A. THIS CASE WILL AFFECT THE RESOLUTION OF OTHER CASES WHERE PLAINTIFF CONTENDS SOMEONE OTHER THAN THE DECISIONMAKER HARBORED A DISCRIMINATORY MOTIVE AND "CAUSED" THE ADVERSE DECISION 1

B. THIS CASE WILL AFFECT THE RESOLUTION OF OTHER CASES WHERE THE DECISIONMAKER HAS NO ACTUAL KNOWLEDGE OF PLAINTIFF'S MEMBERSHIP IN A PROTECTED CLASS 6

II. THIS CASE WILL AFFECT THE RESOLUTION OF OTHER CASES WHERE THE ONLY PROOF OF "WILLFULNESS" IS THE DECISIONMAKER'S KNOWLEDGE OF THE PLAINTIFF'S PROTECTED CLASSIFICATION 8

III. BECAUSE THE SECOND CIRCUIT RELIEVED THE PLAINTIFF OF ANY BURDEN TO MITIGATE HIS DAMAGES AND APPROVED A LIFETIME AWARD OF FRONT PAY, THIS CASE WILL AFFECT THE RESOLUTION OF MANY CASES 9

CONCLUSION 10

TABLE OF AUTHORITIES

Cases	PAGE
Billet v. CIGNA Corp., 940 F.2d 812 (3d Cir. 1991)...	5
Cronin v. Aetna Life Ins. Co., 46 F.3d 196 (2d Cir. 1995)	2
EEOC v. Kallir, Phillips, Ross, Inc., 420 F. Supp. 919 (S.D.N.Y. 1976), *aff'd without op.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977)	10
Fleckenstein v. ITT Consumer Fin. Corp., No. 4-91-CV-459, 1993 WL 285874 (D. Minn. July 22, 1993)	5
Giannopoulos v. Brach & Brock Confections, Inc., 109 F.3d 406 (7th Cir. 1997).....	5
Grottkau v. Sky Climber, Inc., 79 F.3d 70 (7th Cir. 1996)	6
Hazen Paper Co. v. Biggins, 507 U.S. 604 (1993).....	8
McClendon v. Indiana Sugars, Inc., 108 F.3d 789 (7th Cir. 1997)	5
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)	1-2
McGill v. Sybron Corp., 702 F. Supp. 405 (W.D.N.Y. 1989)	5
Nelson v. J.C. Penney Co., 75 F.3d 343 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996)	6, 8
Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) ...	2-3

PAGE

St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502 (1993) ..... passim

Trans World Airlines, Inc. v. Thurston, 469 U.S. 111 (1985) 8

Tubari Ltd. v. NLRB, 959 F.2d 451 (3d Cir. 1992) 9

Weaver v. Casa Gallardo, Inc., 922 F.2d 1515 (11th Cir. 1991) 9, 10

Woodson v. Scott Paper Co., 109 F.3d 913 (3d Cir. 1997) 2

Statutes:

29 U.S.C. §§ 621, *et seq*..... 2

42 U.S.C. §§ 2000e, *et seq*. 2

42 U.S.C. § 2000e-2(m)..... 2

45 U.S.C. §§ 61, *et seq*. 7

ARGUMENT

In his brief in opposition, the Solicitor General argues that the Second Circuit's decision in this case is "too factbound" to be worthy of this Court's review. (*See, e.g.*, Solicitor General Br. at 10) If "too factbound" were the standard for the denial of a petition for writ of certiorari, this Court would not have decided a single discrimination case: discrimination cases, requiring, as they do, proof of a discriminatory adverse decision and some rational evidentiary basis for the evaluation of that proof, are, by definition, "factbound."

The questions of law raised in the petition of Metro-North Commuter Railroad ("Metro-North") are straightforward, and both respondents beg them. The Second Circuit's decision upholds liability and a concomitant willfulness finding where there is no evidence of the decisionmaker's retaliatory intent or even his knowledge of plaintiff's protected activity. The decision also approves a lifetime award of front pay to a relatively young plaintiff who failed to mitigate his damages. These holdings convert this case from one which is "factbound" to one which departs from this Court's precedents and conflicts with the decisions of other Courts of Appeals. It is therefore appropriate for this Court's review.

I. THE LIABILITY HOLDING IN THIS CASE WILL AFFECT THE RESOLUTION OF MANY OTHER DISCRIMINATION CASES

A. THIS CASE WILL AFFECT THE RESOLUTION OF OTHER CASES WHERE PLAINTIFF CONTENDS SOMEONE OTHER THAN THE DECISIONMAKER HARBORED A DISCRIMINATORY MOTIVE AND "CAUSED" THE ADVERSE DECISION

Both the Solicitor General and plaintiff-respondent Stephen M. Padilla ("Padilla" or "plaintiff") argue that the Second Circuit applied a pretext analysis under *McDonnell Douglas*

Corp. v. Green, 411 U.S. 792 (1973), and its progeny, including *St. Mary's Honor Ctr. v. Hicks*, 509 U.S. 502 (1993), and not the "mixed motives" analysis set forth in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

Padilla claims that the Second Circuit did not apply *Price Waterhouse* because the Court did not cite that case. (Padilla Br. at 5) The Second Circuit, citing *Cronin v. Aetna Life Ins. Co.*, 46 F.3d 196, 203 (2d Cir. 1995), held that plaintiff is

> " 'not required to show that the employer's proffered reasons were false or played no role in the employment decision, but only that they were not the only reasons and that the prohibited factor was at least one of the 'motivating' factors.' "

(A-12).[1] *Cronin*, in turn, cites *Price Waterhouse*, 490 U.S. at 247, 249 (plurality opinion), and describes it with the following parenthetical: "where employer has shown a legitimate motive, the plaintiff need not show that the prohibited factor was the sole or principal reason, or '*the* "true reason." ' " *Cronin*, 46 F.3d at 203 (parentheses omitted) (emphasis in original).

The Solicitor General argues, without a supporting citation, that the Second Circuit's "motivating factor" test "is equally true whether the case is governed by *Price Waterhouse* or *Hicks*." (Solicitor General Br. at 12 n.5) If this is an accurate statement of the law, then this Court's decision in *Hicks* is

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[1] The Second Circuit assumed that the "mixed-motives" analysis applies to retaliation cases (A-12), but in *Woodson v. Scott Paper Co.*, 109 F.3d 913, 933-35 (3d Cir. 1997), the Third Circuit held that § 107 of the Civil Rights Act of 1991, 42 U.S.C. § 2000e-2(m), does not apply to retaliation cases under Title VII, 42 U.S.C. §§ 2000e, *et seq*. The Third Circuit's reasoning would apply equally to retaliation cases under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, *et seq*., as the substantive provisions of the two acts are the same. In *Woodson*, the court reversed the denial of defendant's motion for a new trial because, *inter alia*, the trial court had erroneously given a "motivating" factor instruction, rather than a "determinative" factor instruction. *Id.* at 935.

superfluous, and other Courts of Appeals have been wasting their time separating the two distinct analyses.

This Court made clear in *Price Waterhouse* that the "mixed motives" analysis applies only where plaintiff proves that a discriminatory motive was one of the reasons actually motivating the decisionmaker at the time of his decisionmaking. *Price Waterhouse*, 490 U.S. at 241 (Brennan, J., plurality opinion); *see also id.* at 277 (O'Connor, J., concurring).[2]

Arguing that the Second Circuit applied the pretext analysis, respondents impute, *sub silentio* and without citing any supporting evidence, Edmond Boni's alleged retaliatory animus in reporting plaintiff's mismanagement to Donald Nelson, who made the decision to demote plaintiff. (Padilla Br. at 7; Solicitor General Br. at 11-12) Their argument and the Second Circuit's decision share this flaw in reasoning. (A-12 to A-13)

Had the Second Circuit separated the motives of Boni and Nelson, as *Price Waterhouse* requires, and as other Court of Appeals have done in similar circumstances,[3] and applied the

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[2] If he does so, the defendant bears the burden to prove that he would have made the adverse decision anyway. *Price Waterhouse*, 490 U.S. at 244-45 (Brennan, J., plurality op.); *see also id.* at 275-78 (O'Connor, J., concurring). The Second Circuit, however, erroneously applied the "mixed motives" analysis to a "pretext" fact pattern and then compounded its error by depriving Metro-North of the benefit of its proof. Other Courts of Appeals have alternatively applied the "mixed motives" analysis to similar fact patterns and have held that defendant was entitled to judgment as a matter of law. (*See* Pet. at 16) Neither respondent attempts to distinguish those cases.

[3] Padilla attempts to distinguish the cases we cite (Pet. at 14-15) by trying to make it appear that in each case the person harboring the discriminatory motive was far more removed than Boni from the adverse decision. (Padilla Br. at 7-9) In each case, someone with a discriminatory motive arguably "played a role" in the adverse decision. In each case, the Court of Appeals held that defendant was entitled to judgment as a matter of law because plaintiff had not produced proof that the *decisionmaker* relied upon that discriminatory motive in making his decision.

"pretext" analysis to Nelson's decision, it could not have affirmed the district court's denial of Metro-North's motion for judgment as a matter of law. There is no evidence in the record, and none cited in the Second Circuit's opinion, of a causal relationship between Boni's motives and Nelson's decision, and there is no evidence that Nelson's reason was a pretext at all, let alone that it was a pretext for retaliation. *See Hicks*, 509 U.S. at 514-15.

In support of his pretext argument and having imputed Boni's motives to Nelson, Padilla makes much of the "fact" cited in the decision (A-13) that the "mismanagement" of another manager in Boni's department, who was not demoted, resulted in the loss of far more money to Metro-North than did Padilla's mismanagement. (Padilla Br. at 11-12; *see also* Solicitor General Br. at 7) This argument, however, erroneously assumes that Padilla and Paul Hirsh, the other manager, were similarly situated.

Nelson testified about the differences in Hirsh's and Padilla's respective departments. In Nelson's view, Hirsh, who was responsible for the assignment of 900 train and engine employees, needed additional computer support, while Padilla did not need a computer to track the movement of his small workforce. (Tr. at 306-07) Hirsh testified with respect to "coupling," the problem in Padilla's department that Boni and Marijanke Badurina brought to Nelson's attention on May 3 (Tr. at 566-69), that he was "dealing with" that problem by implementing "an absentee control program" he had initiated. (Tr. at 287) In contrast to Hirsh, Padilla did not recognize, much less establish procedures to solve, this problem.

Respondents also rely heavily on Padilla's good performance evaluations. (Solicitor General Br. at 2; Padilla Br. at 2, 11) Padilla's last formal evaluation was conducted in late 1987 (Ex. 7), before Badurina began her review of Padilla's books in February 1988 (Tr. at 183, 361, 481) and before Nelson received Padilla's letter of March 23, 1988, in which Padilla complained that Boni had unfairly accused him of

attempting a "coup" to get Boni's job and in which Padilla expressly told Nelson he would retaliate if anything did happen to him. (Ex. 8) Mismanagement previously unknown is a legitimate nondiscriminatory reason, and past good performance evaluations do not as a matter of law establish pretext. *Billet v. CIGNA Corp.*, 940 F.2d 812, 826 (3d Cir. 1991).[4] Inappropriate behavior is also a legitimate nondiscriminatory reason, and a third party's differing assessment of that behavior does not as a matter of law establish pretext. *McClendon v. Indiana Sugars, Inc.*, 108 F.3d 789, 799 (7th Cir. 1997).

Nelson expected Padilla to know what was going on in the department he was being "paid well" to manage. (Tr. at 370-75, 617) Respondents do not cite evidence of any error in the expanded review Nelson ordered upon suspending Padilla or any evidence casting the slightest doubt upon Nelson's good faith reliance upon that review or upon his own assessment of Padilla's and Boni's performance in his decisions to remove both Padilla and Boni from their positions. Respondents' view, like the Second Circuit's (A-12 to A-13), is simply that the jury was entitled to "disbelieve" Nelson's explanation. (Solicitor Gen. Br. at 12; Padilla Br. at 5, n.1) Plaintiff cannot, however, raise a jury question merely by contending that the jury might "disbelieve" the decisionmaker. *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410-412 (7th Cir. 1997) (collecting cases).

Much as they impute Boni's motives to Nelson, respondents also assume that "timing" is all that is needed to prove pretext. According to them, Nelson did not await the results of the expanded review he ordered upon suspending Padilla to decide to demote him. (Solicitor General Br. at 6, 11-12; Padilla Br. at 2-4) The undisputed fact is that Nelson did not demote Padilla until June 10, and plaintiffs offered no evidence to show that Nelson received any information between

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[4] *See also Fleckenstein v. ITT Consumer Fin. Corp.*, No. 4-91-CV-459, 1993 WL 285874, *5-7 (D. Minn. July 22, 1993); *McGill v. Sybron Corp.*, 702 F. Supp. 405, 408 (W.D.N.Y. 1989).

May 4 (when Nelson suspended him and before Padilla filed his retaliation charge) and June 10 suggesting that Nelson should change his mind. To the contrary, the reports he received on May 13 (Ex. 13) and thereafter (Ex. 14) only confirmed his initial conclusion on May 4 that he should remove Padilla from his position. (Ex. B) Other Courts of Appeals have held that suspicious timing is insufficient as a matter of law to carry the day for plaintiff once defendant articulates a legitimate nondiscriminatory reason for the adverse action. *E.g.*, *Nelson v. J.C. Penney Co.*, 75 F.3d 343, 346-47 (8th Cir.), *cert. denied*, 117 S. Ct. 61 (1996) (collecting cases); *Grottkau v. Sky Climber, Inc.*, 79 F.3d 70, 73 (7th Cir. 1996).

The Second Circuit's decision, in contrast, relieves plaintiff of any meaningful burden to prove causation.

B. THIS CASE WILL AFFECT THE RESOLUTION OF OTHER CASES WHERE THE DECISIONMAKER HAS NO ACTUAL KNOWLEDGE OF PLAINTIFF'S MEMBERSHIP IN A PROTECTED CLASS

As to Nelson's knowledge of Padilla's participation, Padilla cites only his testimony at trial that on April 6, 1988 he told Nelson that he *had an appointment scheduled* with the Equal Employment Opportunity Commission in its investigation of Michael Barletta's charge of age discrimination. (Padilla Br. at 3, 5) Plaintiffs never produced any proof that Nelson knew before he suspended Padilla on May 4, 1988 that Padilla (or anyone else) had actually met with the EEOC, made an affidavit, or participated in any way in that investigation.

As to Nelson's knowledge of the contents of Padilla's affidavit before he suspended him, respondents recite only the "evidence" relied upon by the Second Circuit—that some six months before plaintiff made his affidavit, and without regard to intervening events, he had told Nelson that Boni had wanted Barletta disqualified because he was "too old."

(Padilla Br. at 13)[5] So, according to this reasoning, because Nelson "knew" six months before Padilla even made his affidavit that Padilla "thought" Boni's decision to disqualify Barletta was wrong and because Nelson knew that Padilla had an appointment with the EEOC, Nelson's decision to suspend Padilla on May 4 was retaliatory.

The logic of the Second Circuit's decision would hold Nelson to have retaliated whether or not Padilla ever actually met with the EEOC or made an affidavit, because, in the Second Circuit's and respondents' view, it was enough that Nelson "knew," prospectively, that Padilla had damaging things to say, whether or not he ever actually said them and whether or not they were true. According to this reasoning, after Nelson had gained such knowledge, any adverse decision he then took against Padilla, regardless of the reason behind it, would have been retaliatory. Other Courts of Appeals have rejected such reasoning. (*See* Pet. at 17-19)[6]

The Second Circuit's decision, in contrast, allows plaintiffs to rely upon mere suggestions to prove their employers' constructive knowledge of their protected activity and then to use

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[5] Padilla's statement was that he told Nelson that "Boni was telling me [Padilla] that Barletta was too old *and too slow and making mistakes*." (Tr. at 65) (Emphasis added.) Barletta was a train dispatcher; regardless of his age, a dispatcher's being "too slow" and "making mistakes" can have deadly consequences, especially when he works for a commuter railroad. *See* 45 U.S.C. §§ 61, *et seq.* (train dispatchers one of five groups of "safety-sensitive" railroad employees subject to Hours of Service Act). One of the other items of mismanagement disclosed in the May 13 report was that Padilla failed to send his train dispatchers for mandatory physical examinations. (Ex. 13)

[6] Padilla attempts to distinguish some of the cases we cite, but, once again, begs our argument. (*See* Padilla Br. at 9-10) In each case, plaintiff contended that the "circumstantial evidence" was sufficient to charge the decisionmaker with knowledge of his protected classification, and in each case, the Court of Appeals rejected the argument as a matter of law. Those cases are directly on point and directly contrary.

that "constructive knowledge" as a shield from an adverse decision.

II. THIS CASE WILL AFFECT THE RESOLUTION OF OTHER CASES WHERE THE ONLY PROOF OF "WILLFULNESS" IS THE DECISIONMAKER'S KNOWLEDGE OF THE PLAINTIFF'S PROTECTED CLASSIFICATION

Padilla argues that Nelson's mere knowledge of Padilla's protected activity supports the "willfulness" holding. (Padilla Br. at 13) This reasoning is in direct conflict with *Nelson*, *supra*, where the plaintiff's new manager, who was advised by plaintiff's former manager of plaintiff's age (54), later informed plaintiff that he was aware of his age. The Eighth Circuit rejected as a matter of law the argument that the new manager's awareness of the plaintiff's age was even a basis for liability: "A fact finder may not simply convert a condition that is necessary for a finding of liability (here, knowledge of a plaintiff's age) into one that is sufficient for such a finding." 75 F.3d at 346. In contrast, the Second Circuit converted a "necessary condition," Nelson's knowledge of plaintiff's protected activity, into a "willful" violation.

The Second Circuit's "willfulness" holding is flawed because it is based upon its erroneous liability holding: According to the Second Circuit, once Nelson was charged with Boni's motive and once he was charged with constructive knowledge that plaintiff was, or might at some point be, in a protected class, Nelson "willfully" violated the law, *per se*, when he demoted plaintiff. The Second Circuit's decision equates mere knowledge of a protected activity with "willful" disregard of the law and is contrary to this Court's decisions in *Hazen Paper Co. v. Biggins*, 507 U.S. 604, 615-17 (1993), and *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 127-28 (1985).

III. BECAUSE THE SECOND CIRCUIT RELIEVED THE PLAINTIFF OF ANY BURDEN TO MITIGATE HIS DAMAGES AND APPROVED A LIFETIME AWARD OF FRONT PAY, THIS CASE WILL AFFECT THE RESOLUTION OF MANY CASES

Respondents argue that Padilla was relieved of any burden to mitigate his damages by seeking comparable employment, because, as a skilled manager, he had no reasonable prospects of finding such work. (Solicitor General Br. at 14; Padilla Br. at 13-14) This argument is not supported by any proof that Padilla actually sought any comparable employment. Both respondents attempt to distinguish *Tubari Ltd. v. NLRB*, 959 F.2d 451, 459 (3d Cir. 1992), on the ground that the workers in that case were "unskilled" (Solicitor General Br. at 14 n.5; Padilla Br. at 15), thereby suggesting that skilled workers are automatically relieved of any burden to attempt reasonable mitigation efforts. We know of no such limitation on the duty to mitigate. The Second Circuit's decision is directly contrary to *Tubari*.

Had Metro-North fired Padilla outright, he would have had, unquestionably, a duty to mitigate. Padilla makes the nonsensical argument that Metro-North relieved him of this duty because Nelson demoted rather than fired him. (Padilla Br. at 13) By this reasoning, an employer who demotes rather than dismisses an employee is punished because its liability will never be reduced beyond what the lower position pays.

As to the Second Circuit's approval of the lifetime award of front pay, both respondents simply argue that that award is appropriate in lieu of reinstatement. (Solicitor General Br. at 15; Padilla Br. at 15) The Solicitor General contends that *Weaver v. Casa Gallardo, Inc.*, 922 F.2d 1515, 1528 (11th Cir. 1991), is distinguishable on its facts because there the district court did not state any reason why the plaintiff "should not have been able to work his way up . . . to a supervisory position." (Solicitor General Br. at 15) That is the exact situation

in this case; the Second Circuit did not cite any evidence to support its conclusion that the front pay award was appropriate in the "unique circumstances of this case." (A-18 to A-20) *Weaver* is directly on point and directly contrary.

Finally, Padilla, having admitted that his skills are in dispatching trains rather than in managing people (Sept. 15, 1994 Tr. at 17), contends that the award is justified as an additional punitive measure for Metro-North's unlawful retaliation in demoting a "young man." (Padilla Br. at 15) However, the purpose of front pay is to give plaintiff "a reasonable opportunity to find other employment," *EEOC v. Kallir, Phillips, Ross, Inc.*, 420 F. Supp. 919, 927 (S.D.N.Y. 1976), *aff'd without op.*, 559 F.2d 1203 (2d Cir.), *cert. denied*, 434 U.S. 920 (1977), not to punish the employer for the remainder of the employee's working life.

CONCLUSION

The Court should grant certiorari in this case.

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